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No. 1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

H. NEIL KELLY, JR.,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, H. Neil Kelly, Jr., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

No opinions were filed by the court of appeals or the district court.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1969. A timely petition for rehearing was denied on December 5, 1969. Mr. Chief Justice Burger

extended the time for filing a petition for certiorari to and including February 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether, particularly where petitioner during trial by jury did not present witnesses nor testify in his own behalf, refusal of district court to give defendant's requested instruction No. 5 (the wording of which was in strict accord with the approved and long standing established standard instruction prohibiting self-incrimination through failure to testify in such cases theretofore followed in the District of Columbia by said court) contributed to or resulted in petitioner's conviction and deprivation of liberty in contravention of the "*due process of law*" clause of the 5th Amendment.

(2) Whether petitioner's conviction and deprivation of his liberty breached the "*due process of law*" clause of the 5th Amendment by failure of the government, as manifested by the trial record, to establish through competent or credible evidence all of the essential statutory elements of the offenses charged in the indictment.

(3) Whether petitioner's conviction and deprivation of his liberty breached the "*double jeopardy*" clause of the 5th Amendment by the variance between the pleading and proof in connection with the $3000 check referred to in counts 1 and 2.

(4) Whether, particularly where, in relation to count 1, the district court instructed or stated in its general charge that (a) "if the check is not covered by sufficient funds, then you may find a false representation has been made." (b) "The phrase 'something of value' includes a check drawn in the sum of $2835.30 and delivered", it wrongfully charged the jury as to the law applicable to the case; and in its general charge whether the district court wrongfully charged or failed to fully or correctly

charge the jury in matters of law, or by its charge invaded the province of the jury in determining matters of fact, contributed to or resulted in petitioner's conviction and deprivation of liberty in contravention of both the "*due process of law*" clause of the 5th Amendment and the right to trial by "*jury*" clause of the 6th Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

5th Amendment, Constitution Of The United States provides, in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

6th Amendment, Constitution Of The United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; . . ."

STATUTORY PROVISIONS INVOLVED

Title 22 District of Columbia Code Section 1301 provides, in pertinent part:

> "Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, . . , for value, knowing the same to be worthless, . . , shall, if the value of the property or the sum or value of the money or property so obtained . . is $100 or upward, be imprisoned not less than one year nor more than three years, or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both."

Title 22 District of Columbia Code Section 1410 provides, in pertinent part:

"Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1000, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fee, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word 'credit' as used herein shall be constructed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order."

Title 18 United States Code Section 3481 provides, in pertinent part:

"In trial of all persons charged with the commission of offenses against the United States . . . , the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

STATEMENT

1. Proceedings below.

Petitioner (a long time resident of Miami, Florida) by a 3-count indictment filed in the United States District Court for the District of Columbia on October 24, 1966, was ostensibly charged in count 1 with violation of the "*false pretenses*" section (22 D.C.C. 1301) and in counts 2 and 3 with violation of the "*worthless*" check section (22 D.C.C. 1410) of the code of laws of the District of Columbia. On March 17, 1967 petitioner was arraigned upon the indictment in said district court, with counsel present, and pleaded not guilty. He was released by the court on bail bond in the sum of $1000 and allowed time to file appropriate motions. Subsequently petitioner filed a motion for a bill of particulars which was thereafter denied by the court. Trial by jury commenced on February 14, 1968.

On February 16, 1968, at the conclusion of the government's case, petitioner submitted an oral motion for a judgment of acquittal on all counts of the indictment, which was denied by the court. Petitioner presented no witnesses and the defense rested. Proposed instructions (numbered 1-5) requested by the defense were filed and denied by the court.[1] Thereupon the court charged the jury and submitted the case for verdict. Thereafter the jury retired and returned into court with its verdict finding the petitioner "guilty" on each count as indicted. By order of court petitioner was continued on bond pending sentence. On February 26, 1968 petitioner filed a motion for judgment of acquittal (notwithstanding the verdict) or in the alternative for a new trial which was denied by the court on March 14, 1968. On April 5, 1968 petitioner

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[1] Prior and subsequent to its charge to the jury petitioner objected to the court's charge relative to the value of a check drawn by the witness Harding and its refusal to give the instructions proposed by the defense.

was sentenced to 1 to 3 years imprisonment on count 1, and imprisonment for 1 year on counts 2 and 3; sentences on all counts were ordered by the court to run concurrently. Upon indication that an appeal would be prosecuted the court reset petitioner's bond at $5,000 and released him in custody of his counsel pending filing of notice and posting of bond on appeal. Thereafter bond on appeal and notice of appeal were filed with the clerk of court. On November 3, 1969 the court of appeals affirmed the judgment of the district court (no opinion filed) and denied a rehearing on December 5, 1969.

2. Summary of case and evidence below.

Count 1—the false pretense charge.

Count 1 involves 3 persons and 2 checks. Considered in a light most favorable to the government, the evidence adduced at trial established:

That on September 9, 1965 a check (No. 5) payable to Herman Harding, bearing date "Sept 9, 1965", in the sum of $3000, drawn on the Second National Bank of North Miami, North Miami, Florida, on checking Account No. 200-452-6 and signed by petitioner was delivered to one Gerald Connor (App. 5-6, 104).

Martha Engstrom, head bookkeeper at the Second National Bank of North Miami, produced as a witness on behalf of the government testified, based on subpoenaed Second National Bank records, that No. 200-425-6 was one of the bank's checking account numbers which it had assigned to H. Neil Kelly, Jr. as shown by a card completed at the time said account was opened in September 1965 with an initial deposit of $100; that no further deposits were made in September 1965 (App. 20-23).

Connor testified that he delivered the check to Herman Harding about 2 weeks after receiving it from petitioner (App. 96); that the check was for stock which Connor

had purchased on petitioner's behalf on September 2, 1965 (App. 104). Connor also testified that he had, as a registered representative of Francis I. Du Pont and Company, serviced an account for Harding (App. 87); that he met the petitioner in January 1965, some 7 or 8 months before (App. 88); That he had solicited petitioner for an account on numerous occasions (App. 89, 112) but was "never successful in opening one," (App. 112); that he received a check for "somewhere around $2800" from Harding in exchange for petitioner's $3000 check, Harding's check being made payable to Du Pont & Company for stock which Connor had ostensibly purchased on behalf of petitioner (App. 97-98). Connor acknowledged his exchange of checks to effect the above described transaction ". . . was not—a—a normal transaction." (App. 102) Connor also testified that he obtained permission from Harding to use Harding's dormant account to purchase the stock in question, and that he heard Mr. Harding, over the telephone, personally give petitioner permission to use said dormant account (App. 113-116). Connor further testified that he had never before, nor thereafter, engaged in a transaction such as the one he averred he was "*middle man*" between Kelly and Harding (App. 102). Shortly after the Kelly-Harding transaction, "late in September 1965", Connor's employment as a registered representative of Francis I. Du Pont and Company was terminated (App. 102). The stock in question was never delivered to the petitioner (App. 47).

David K. Folmer, Vice-president of the First National Bank of Washington, D.C., produced as a witness on behalf of the government, based on subpoenaed First National Bank records, testified that a bank deposit slip dated September 20, 1965 (marked Government's Exhibit 4 for identification) in the amount of $3000 (a check item) was credited to the account of Herman M. Harding, Jr.; that prior thereto, and on September 15, 1965

the Harding account showed a cash balance of $14.85 (App. 29-32); that the Harding account had sufficient funds to honor a check for $2835. if presented on September 20 as revealed by the record balance of such account (App. 32-33); that a check drawn against the Harding account for $2800 was honored properly by the bank (App. 34).

Herman M. Harding, Jr., testified that he received a check for $3000 from Gerald Connor, for stock which Connor stated had been purchased by him for petitioner through Harding's dormant account, on September 20, 1965 (App. 44-45); that in turn he gave Connor a check payable to "Francis du Pont" in "the neighborhood of $2870 and maybe some cents" and "immediately" went to his bank and deposited the $3000 check (App. 45); that he did not know the details of the transaction between Kelly and Connor but that he permitted his dormant account to be used because Connor, an old friend, had requested it (App. 40, 43); that he had known petitioner Kelly only a short time prior to the September transaction; that he met with petitioner socially on 3 occasions prior to said transaction and had never discussed the September transaction with petitioner during any stage of its development (App. 40-41, 44, 49, 63); that "*the fact is Mr. Kelly did not ask me, did not mention the particular shares that were purchased in my account. He himself* (petitioner Kelly) *did not contact me with regard to those. It was Mr. Connor . . .*" (Emphasis supplied. App 63).

Harding also testified that he received a telephone call in August 1965 from a person, who said and whom he thought was "Kelly", stating that some money would be sent to him through the mail; that the subject matter of the telephone call did not deal in any way with the transaction which took place in September 1965, but was limited to the statement that money would be sent to Harding through the mail (App. 42, 49); that he never con-

tacted petitioner concerning the $3000 check, but that during the latter part of November or the "first part of December" 1965 "Mr. Kelly called me" and "told me that if I would send the shares which he had wanted Mr. Connor to purchase—by then I had the certificates, the one thousand shares,—if I would send a sight draft to Columbus, Ohio, that he would make good this $3,000.00 check that he had given me earlier."; that he sent the shares to Columbus but the shares were returned to him 2 weeks later undelivered and that he placed the shares with his attorney (App. 46-47).

Petitioner Kelly, the third person involved, did not testify and was penalized by the district court in its charge to the jury for not so doing.

Count 2—the "worthless" or insufficient fund check charge.

Count 2 involves petitioner and Herman Harding and the same $3000 check drawn on the Second National Bank of North Miami on checking Account No. 200-452-6 hereinbefore described. This check was utilized to convict petitioner on both counts 1 and 2.

Count 3—similar to count 2.

Count 3 involves petitioner and Gerald Connor and a check for $2,205.00. Connor testified that:

On September 9, 1965 a check (No. 3), bearing date "Sept 4, 1965", payable to Gerald E. Connor in the sum of $2,205 drawn on the Second National Bank of North Miami, North Miami, Florida, against checking account No. 200-452-6 and signed by petitioner was delivered to said Connor (App. 7, 93-94).

Connor also testified petitioner gave him both the check made out to himself for $2,205 and the check for $3000 made in favor of Herman Harding on the same occasion at the "Old Stein" restaurant "up on Connecticut Avenue" on September 9, 1965 (App. 131); that he ob-

served the petitioner writing out both checks but was unable to explain why the check made out to him bore the date "Sept 4, 1965" and the check for Harding was dated "Sept 9, 1965", stating that his "obvious conclusion is that one is either post-dated or the other is pre-dated and I don't know which." (App. 132-134). The witness Connor also testified that the $2,205 check made out to him "was to pay off some indebtedness that he (petitioner) had incurred to me." (App. 94).

REASONS FOR GRANTING THE WRIT

(1) The initial question presented by this petition is of paramount importance to the proper administration of criminal justice, of underlying significance upon constitutional issues affecting federally protected rights against self-incrimination by remaining silent at trial following a plea of "Not Guilty"

"Defendant's Request To Charge, No. 5", which was rejected by the district court, reads:

> "You may not infer anything derogatory against the defendant because he did not testify in his own behalf; in other words, you may not hold his silence against him. For it is the burden of the Government to prove defendant guilty beyond a reasonable doubt, and defendant is not required to establish his innocence.
>
> "Further, the defendant has not been completely silent in this case, for, at the outset at the time of his arraignment, defendant entered a plea of "Not Guilty" to the charge in the indictment, and by his plea of "Not Guilty" he has put in issue every essential factual element required to be proven in support of the indictment.
>
> "(Note: the second paragraph of the foregoing request is an instruction given in this Court in similar situations by the late James Kirkland; specifically, the instruction was given in the case of

United States vs. *Robert M. Hogue*, Crim. No. 1063-57)." (App. 10)

The requested charge should have been granted. Such a charge is *mandatory* under the 5th Amendment and 18 U.S.C. 3481.

At common law a defendant could not be compelled to give evidence against himself. The 5th Amendment incorporated this rule into the Constitution Of The United States (*McKnight* v. *United States*, 115 F. 972, 981, 982, quoted with approval by this Court in *Bruno* v. *United States*, 308 U.S. 287 and in *Griffin* v. *California*, 380 U.S. 609 (1964))

Had the statute not specifically provided that no presumption arises from failure to testify in one's own behalf, the constitutional provision, *ex industria*, means as much, so that silent defendants might be protected from any adverse conclusion of an incriminatory nature which would flow from such silence.

Should everybody or an appreciable number of people believe that a person failing to take the stand is actuated by fear predicated upon a "*consciousness of guilt*", then the privilege of testifying creates a presumption which extinguishes the constitutional protection of the 5th Amendment. The provisions of Section 3481 have been in existence so long that jurors today generally know that a defendant may testify, but do not know of the constitutional protection provided by the rule against self-incrimination. Obviously, the only practical way to make the defendant's rights known to the jury is by a clear, correct, and cogent statement of the applicable law. If the eyes of the jury see the "*taint of guilt*" on every defendant who remains silent, whether on the advice of his counsel or otherwise, then the necessity of a charge such as that requested is conclusively established. *See*, 4 *Wigmore on Evidence*, *pp.* 811, 814, 815; *Stout* v. *United States*, 227 F. 799; *Michael* v. *United States*, 7 F. 2d

865; *Hersh* v. *United States*, 68 F. 2d 799; *Swenzel* v. *United States*, 22 F. 2d 280.

In Bruno the court was requested but refused to give the following instruction:

> "The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberatons of the jury in any manner."

The trial court declined Bruno's requested charge, saying "I feel that I have already covered that."

In our instant case the district court disposed of this important constitutional right in a single unexplanatory sentence, reading as follows:

> "The law does not compel a defendant to take the witness stand and testify and no presumption of guilt may be raised and no inferences of any kind may be drawn from the failure of any defendant to testify." (App. 197)

Inasmuch as there are several kinds or classes of "*presumptions*" abounding in our jurisprudence, including the "*presumption of innocence*", the district court's insipid charge on this point served only to direct the jury's attention to petitioner's failure to testify and could in no way justify that court's refusal to give the requested charge. *Cf. Bruno* v. *United States, ubi supra; McKnight* v. *United States, supra.*

Finally, if the district court's refusal to give the approved and long standing established standard charge prohibiting self-incrimination through failure to testify in such cases, theretofore followed in the District of Columbia, is not overruled, then the federally protected rights of defendants in criminal cases to enter pleas of "*Not Guilty*" and remain silent would be utterly de-

stroyed. This would stand the 5th Amendment on its constitutional head and render its substance as elusive as quicksilver in a nest of cracks.

(2) The evidence is both inherently incredible and insufficient as a matter of law to sustain the convictions obtained in this case.

There was not a scintilla of evidence adduced at trial upon which the jury could find as a matter of fact that petitioner did not have sufficient credit, extension of credit or a line of credit with the Second National Bank of North Miami in checking Account No. 200-452-6, or in any other account with the bank, to cover the checks which he allegedly wrote, delivered to Connor and to Harding through Connor in September 1965. Moreover, although the district court was requested to but did not do so, petitioner was not required to prove his innocence since his plea of "*Not Guilty*" placed "in issue every essential factual element required to be proven in support of the indictment." Upon these points the trial court also did not charge the jury.

We have neither the time nor space in the preparation of this petition to set forth the miasmic maze and mass of inherently incredible evidence disclosed by the trial record in this case. However, for present purposes, it will suffice to observe that the "*evidence*" coming from the convicting witnesses (Connor and Harding) would stultify the mentality of an infant in arms. Certainly their combined offerings, as well as in all of its parts, failed to establish, as a matter of law, a scheme or course of conduct which would bring petitioner within the purview of the denunciatory provisions of the false pretenses statute. Cf. *Gilmore* v. *United States*, 273 F. 2d 70; 106 U.S. App. D.C. 344; *Cliett* v. *Scott*, 102 F. 2d 725; *People* v. *Thomas*, 239 P. 914; 108 C.A. 2d 822. Assuredly such offerings do not measure up to the constitutional requirements so essential to deprive a person of his liberty.

(3) In view of the allegations and descriptions of the checks set forth in the indictment, and the evidence supplied by the bank records and testimony of the bookkeeper of the Second National Bank of North Miami, there is a fatal variance between the pleadings and the proofs adduced at the trial. In this posture of the case petitioner is deprived of his constitutional protection against double jeopardy. See, *Ex parte Lange*, 18 Wall. 163, and cases there cited.

(4) For the reasons stated in (1) petitioner's conviction and deprivation of liberty contravene both the "*due process of law*" clause of the 5th Amendment and the right to "*trial by jury*" clause of the 6th Amendment.

CONCLUSION

For the foregoing reasons, certiorari should be granted, the judgment of the court below should be reversed, and the case should be remanded for a new trial.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[United States Court of Appeals for the District of Columbia Circuit filed Nov. 3 1969 Nathan J. Paulson clerk (no opinion)]

September Term, 1969
Criminal 1232-66

No. 22,207

H. NEIL KELLY, JR.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Wright and Leventhal, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court:

Nathan J. Paulson
Clerk

Dated: November 3, 1969.